



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 31, 1995

Ms. Tracy R. Briggs  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR95-057

Dear Ms. Briggs:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29522.

An individual apparently died in his jail cell while in the custody of the City of Houston (the "city"). His survivors hired an attorney, who has asked the city for "all reports filed by the treating physician or his assistants at City Jail" concerning the deceased individual. You submitted to this office for review documents that are responsive to the request. You additionally submitted criminal history information and arrest information that you contend is related to the litigation, but that is not responsive to the request. We did not consider this information. As to the responsive documents, you contend that they are excepted from disclosure pursuant to section 552.103(a).

Our review indicates that most of the records at issue are Emergency Medical Service ("EMS") records concerning the individual who died or records created by or under the supervision of a physician. Section 5.08(b) of the Medical Practice Act (the "MPA") provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). The MPA authorizes release of medical records to a personal representative of a deceased individual, provided that the written consent specifies (1) the information to be covered by the release (2) the reasons or purpose for the release and (3) the person to whom the information is to be released. *Id.* § 5.08(j)(1). Access to medical records is governed by the MPA rather than section 552.103(a). Open Records Decision No. 598 (1991) at 4. Therefore, you must release the medical records to the deceased's personal representative if you receive an adequate written consent.

Section 773.091 of the Health and Safety Code (the "EMS Act") provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Sections 773.092 and 773.093 of the EMS Act provide for access to records when a personal representative presents a written, signed consent that specifies (1) the information to be released, (2) the reasons or purpose for the release and (3) the person to whom the information is to be released. Access to section 773.091 records is governed by the EMS Act rather than section 552.103(a). Open Records Decision No. 598 at 4 n.2 (since the EMS Act provides for the same confidentiality requirements and requirements for access as the MPA, this office's analysis under the MPA is equally applicable to the EMS Act). Therefore, as with medical records, you must release EMS records to the deceased's personal representative if you receive an adequate written consent.

There appears to be only one responsive document at issue that is not subject to the EMS Act or the MPA.<sup>1</sup> We have marked this document and will address whether it may be withheld under section 552.103(a) of chapter 552. To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city has met its burden of showing that litigation is pending, and the document at issue is related to the litigation. This document may therefore be withheld under section 552.103(a).

In reaching this conclusion, we assume that the opposing party to the litigation has not previously had access to the document at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the anticipated litigation

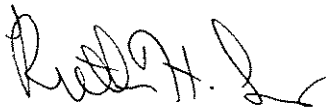
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<sup>1</sup>The document in question is at least arguably responsive.

have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). The applicability of section 552.103(a) also ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/MAR/rho

Ref.: ID# 29522

Enclosures: Marked documents

cc: Mr. Bruce Harrison  
Abraham, Watkins, Nichols Ballard & Friend  
800 Commerce Street  
Houston, Texas 7002-1776  
(w/o enclosures)

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<sup>2</sup>We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the city's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.